

**Before the
Internet Corporation for Assigned Names and Numbers
Marina del Rey, California**

In the Matter of

Uniform Dispute Resolution Policy

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**Comments on the
Implementation Documents by the
Office of Advocacy, U.S. Small Business Administration**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) submits these Comments to ICANN’s Implementation Document for the Dispute Resolution Policy.¹ As it has previously stated, Advocacy tentatively supports a mandatory Uniform Dispute Resolution Process (“UDRP”) that is narrowly tailored to rectify situations of blatantly abusive registrations. Advocacy requests that ICANN initiate a proceeding to determine how providers and panelists are accredited. Also, Advocacy proposes two alternative means of selecting panelists. Finally, Advocacy recommends a few amendments to the UDRP policy and strongly recommends that only ICANN have the ability to amend a policy once it is adopted.

The United States Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305² to represent the views and interests of small business within the U. S. federal government. Its statutory duties include serving as a focal point for concerns regarding the government’s policies as they affect small business, developing proposals for changes in U.S.

¹ Internet Corporation for Assigned Names and Numbers, *Implementation Documents for the Uniform Dispute Resolution Policy* (rel. September 29, 1999) < <http://www.icann.org/udrp/udrp.htm>> (last visited October 13, 1999).

² Codified as amended at 15 U.S.C. §§ 634(a)-(g), 637.

Federal agencies' policies, and communicating these proposals to the agencies.³

Small businesses are a crucial element of the U.S. economy and the Internet. In 1998, there were 23 million small businesses in the United States, who represent more than 99 percent of all employers in this country. Small businesses employ 52 percent of private workers and employ 38 percent of private workers in high-tech occupations. Virtually all of the net new jobs in the United States were provided by small businesses.

Small businesses use of the Internet is rapidly expanding. In the past two years, small businesses with access to the Internet has doubled from 21.5 percent to 41.2 percent. Thirty-five percent of small businesses maintain a Web site and one in three do business transactions through their site. Any policy that detrimentally affects the ability of these small businesses to use the Internet would have a significant impact on this nation's economy and limit the effectiveness of the Internet as a tool of business and commerce.

1. Economic Impact of the Proposed UDRP on Small Business

Advocacy is greatly concerned about the potential impact that the UDRP will have on small business domain name registrants and domain name holders. Because of the unprecedented nature of the UDRP, Advocacy does not have sufficient economic data on hand and would require extensive research to evaluate properly the UDRP. Therefore, Advocacy was unable to do a thorough economic analysis within the tight constraints of the comment period.

Advocacy is convinced that the UDRP will have a significant impact on small businesses that register domain names. The costs associated in participating in a global dispute resolution process, which will include choosing panelists, presenting evidence and arguments, and conforming to the rules of the UDRP are substantial. Advocacy will observe the effect of the UDRP on small businesses and will recommend changes, as their need becomes apparent.

³ 15 U.S.C. § 634(c)(1)-(4).

2. Selection Procedure for Providers and Panelists

Advocacy believes that the selection procedure for providers and panelists is crucial to ensure that the UDRP remain as efficient, inexpensive, fair, and accessible as possible. If the UDRP does not achieve these four goals, the value of the UDRP is undermined and loses its appeal as an alternative to the court system. In light of these concerns, Advocacy makes the following two recommendations to ICANN on this issue.

a. Accreditation of Providers and Panelists

Advocacy was unable to find any mention in the Staff Report, Rules, or Policy Statement of the process of how providers and panelists are accredited. This is a crucial step as it determines the ultimate bank of decision makers and forums for that decision making process. Advocacy recommends that ICANN initiate a proceeding at its November meeting in Los Angeles to solicit comments on this issue. Advocacy believes that fairness would be best served if panelists were accredited separately from the providers or if ICANN works with the providers to create uniform accreditation requirements.

b. Selection of Panelists

Advocacy proposes two additional choices for the selection of panelists that is different from the four selections presented in the staff report. Under the first scenario, the complainant would choose the provider who would compile a list of all panelists available through itself and all other providers. This list would be sent to the both the complainant and the respondent who would be asked to pick their top choices. The exact number can vary depending upon the overall number of panelists available – but Advocacy recommends ten or 25 as a good starting point. The provider would then compare the selections of the respondent and complainant. It would then randomly choose a panelist from any overlap. If there is no overlap, then the provider

would request the complainant and the respondent to expand the number of choices and compare again. This would happen repeated until finally there is an overlap.

This scenario has the advantage of allowing both parties have say in the final panelist, who presumably would be acceptable to both parties. However, the repeated requests for panelist choices will add time to the process and will require that each party be familiar with many different panelists which could be a sizable undertaking if the body of accredited panelists is large.

The second scenario would be a simple rotation through the list of panelists. When a complainant files with the provider, the provider assigns the next available panelist. To provide some control, Advocacy recommends that ICANN allow each party two objections to a panelist. If a party uses an objection, the next panelist in the rotation is assigned.

This scenario takes the choice out of the hands the parties and the provider. It is fast and efficient and is similar to the manner in which a judge is assigned to a case. The two parties can use their objections to have some control over the final selection as panelists. The drawback is the lack of control and reliance on a rotation, which would prevent parties from using a mutually acceptable panelist outside the rotation.

Advocacy asks ICANN to allow comment on these two alternative proposals. A longer comment period for these proposals would not interfere with the comment deadline for the UDRP policy and the rules.

3. Specific Recommendations to the Proposed Implementation Documents

Considering the many varied interests and difficult subject material, Advocacy commends the drafting committee on its final product. The proposed policy and rules contain

many provisions that will protect the interests of small businesses and individuals on the Internet. Advocacy does make a few recommendations to improve the fairness of the UDRP.

First, Advocacy believes that Section 4(c)(iii) of the policy should be amended to remove the phrase "...or to tarnish the trademark or service mark." This term is vague and expands the rights of trademark holders beyond the protections of law. A comparative advertising use of a mark or use by a competitor could be deemed as tarnishment in the eyes of the panelist. Also, consumer protection groups or other watchdog organizations might be deemed to tarnish a trademark through their articles or discussion. Enforcing a tarnishment standard would draw the UDRP into the arena of content regulation.

Second, Advocacy believes that Section 4(k) of the policy should be amended to allow fifteen business days before the registrar enforces the decision of the administrative panel. Advocacy believes this is the minimum time to adequately prepare a court filing. Considering the drastic effect of a cancellation or transfer on the domain name, the registrant should have sufficient time to respond to a panel decision.

Third, Advocacy recommends the ICANN amend Section 3(c) of the policy to make it consistent with Section 4(k). Currently, Section 3(c) makes no mention of the registrar's delay before implementing a panel decision.

Lastly, Advocacy recommends that Section 9 of the policy be amended to require that the registrar must notify all registrants of any changes in the UDRP. This notification can be sent by to the e-mail address the domain name registrant listed in its application. Any changes should not be effective until 30 days after the notification is sent.

Advocacy also strongly believes that the registrant should not possess unilateral power to modify the UDRP at any time. Any changes to the UDRP should come from ICANN. ICANN

is able to provide the appropriate vehicle for notice and comment that should result in a fair and equitable decision. A grant of unconditional power to the registrar will upset the delicate and precise balance contained in the UDRP.

Conclusion

Advocacy asks that ICANN consider the enormous impact that the UDRP will have on small businesses that are both domain name registrants and Internet users. To preserve fairness and transparency, Advocacy requests that ICANN initiate a proceeding to determine how providers and panelists are accredited. Advocacy proposes two alternative means of selecting panelists that could provide a selection process that is fair to all parties and wishes that other parties have the opportunity to comment. Finally, Advocacy recommends a few amendments to the UDRP policy and strongly recommends that registrar not have unilateral power to modify the UDRP. Instead, ICANN should be the only body able to modify the UDRP after appropriate public comment.

Respectfully submitted,

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